

**PUBLIC MATTER – DESIGNATED FOR PUBLICATION**

FILED December 26, 2003

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of )  
 )  
**MONICA MALEK-YONAN,** )  
 )  
A Member of the State Bar. )  
\_\_\_\_\_ )

**97-O-14777**

**OPINION ON REVIEW; AND  
ORDER TERMINATING  
INACTIVE ENROLLMENT**

Respondent Monica Malek-Yonan requests our review of the hearing judge's decision recommending that she be disbarred from the practice of law in California. The hearing judge found that respondent abdicated her responsibility as an attorney to properly supervise her client trust account, which consequently enabled her non-attorney office staff to steal \$1.7 million from the trust account over a period of approximately one and one-half years. The hearing judge also found that respondent failed to render a timely accounting to three clients and failed to pay those three clients promptly their share of a settlement; and in a final matter, that respondent threatened to present criminal charges to obtain an advantage in a civil dispute.

Upon independently reviewing the record (Cal. Rules of Court, rule 951.5; *In re Morse* (1995) 11 Cal.4th 184, 207), we adopt some, but not all, of the hearing judge's factual findings and culpability conclusions. While we agree with the hearing judge that respondent's gross inattention to one of the most fundamental duties of an attorney, safeguarding client funds, along with her other misconduct, is serious and requires significant discipline, the very limited record in this proceeding and analogous case law do not support disbarment. We shall instead recommend that respondent be suspended from the practice of law for five years, that execution

of that suspension be stayed, and that she be placed on probation for five years on conditions, including that she be actually suspended from the practice of law for eighteen months.

## **I. FINDINGS AND CONCLUSIONS<sup>1</sup>**

The notice of disciplinary charges in this matter charged 25 counts of misconduct. At trial, but prior to the presentation of evidence, the State Bar moved to dismiss 19 of the counts based on insufficient evidence. The hearing judge granted the motion. The hearing judge found respondent culpable of all of the charged misconduct in five of the remaining six counts and not culpable in one (count 21). Little evidence was presented at trial regarding count 21 and the State Bar does not contest and has not briefed the hearing judge's conclusion regarding this count. Accordingly, the record before us contains evidence relating to five of the counts in the notice of disciplinary charges and our review is necessarily limited to those counts.

As indicated above, we have independently reviewed the record, and we adopt the following findings of fact regarding culpability.

### **A. Counts 1 and 2.**

Respondent was admitted to the practice of law in California in December 1986 and has no prior record of discipline. She has always been a solo practitioner and the majority of her experience has been in personal injury cases. The events in question in this proceeding occurred in 1997 through 1999. During this time respondent had an office in her home in Glendale, where she resides with her parents, and an office in Orange County, which she opened in 1997 and closed in 1999. While open, the Orange County office handled a large number of personal injury cases, about 500 files which represented between 1,800 and 1,900 individuals. Respondent

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<sup>1</sup> Respondent was the only witness to testify in the culpability portion of this matter. The hearing judge found her testimony to be "self-serving and inconsistent." Yet, respondent's testimony was the only evidence supporting many of the hearing judge's factual findings. The hearing judge implicitly found respondent's testimony to be credible at least in part. In addition, some of the hearing judge's "findings" are a recital of witness testimony. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968-969, fn. 2.) Further, upon our independent review of the record, we have not found clear and convincing evidence supporting some of the hearing judge's factual findings.

would normally spend three days a week in her Orange County office and the remainder of the week either in her Glendale office, appearing in court, or attending depositions. The misconduct in this proceeding occurred as a result of the activities that occurred in the Orange County office.

The employees in the Orange County office were Ali Hashemi (“Ali”), the bookkeeper; Ken Taghizadeh (“Ken”); respondent’s assistant (and Ken’s wife), Veronica Perez-Taghizadeh (“Veronica”); the office manager; and two secretaries and a receptionist. Although the circumstances surrounding the formation of the Orange County office are not very clear, it appears that respondent hired all of the employees. Ali and Ken were recommended to respondent, by a distant cousin. Respondent found out after the events in question here that Ken had served two terms in prison, one for 18 months for drug trafficking. Prior to being hired by respondent Ali and Ken worked for a personal injury attorney who was moving out of state. Respondent agreed to review the cases he was leaving behind and ended up taking some, but not all, of them.

Respondent would pay herself from her Orange County practice whenever she needed money. She had no need for a regular salary or “draw” because she did not have regular bills as she was living at home. If she wanted to get paid, she would ask Ali if she could take out a certain sum from the general business account. Ali would then issue her a check. She did not know the maximum amount of money that she had in the general business account during 1997 and 1998.

Respondent did not sign the checks on her general business account or client trust account. Instead, she authorized Ali to sign the checks using a rubber stamp of her signature. Respondent did not personally review any of the bank statements from her Orange County client trust account. She never compared the settlement checks she received with the deposits in the trust account nor did she look at any of the cancelled checks for any of her accounts. She never checked or reconciled the trust account. Respondent asked Ali for the bank statements for the trust account, but Ali would make excuses such as that they were at the accountant’s. Another

time, respondent was scheduled to go over the bank statements with Ali when her office was burglarized and the bank statements were stolen. Respondent did nothing more to obtain or review the bank statements.

Respondent personally negotiated the settlements with the insurance adjusters for all her clients and negotiated reductions in medical provider lien claims in some of the cases. In other cases, Ken and Ali negotiated the reduction of medical provider liens. When a case settled and the settlement money was received, respondent would determine the amounts to be disbursed and direct Ali to prepare disbursement checks in the appropriate amounts. She would then review the file and the actual disbursement checks before she authorized her staff to send the checks out. Only later did she learn that the checks she reviewed were not actually sent as she had instructed.

Around the second week of August 1998, respondent was in her Orange County office. Veronica usually opened the mail, but on this occasion respondent happened to do so. One letter was from an attorney of a former client and it indicated that the client did not receive all of the settlement money that she should have. Respondent knew she had authorized the disbursement of the settlement checks in this case and she became suspicious. She asked Ken and Ali about the matter and was told that they delayed sending the checks to the client because they had negotiated reductions of the medical liens and the client was going to get more money. Respondent found this explanation reasonable but nevertheless was suspicious, so she instructed the bank manager to call her in the future whenever someone attempted to cash checks drawn on her trust account.

On Friday, August 28, 1998, respondent received a call from the bank manager informing her that there were three people who were trying to cash settlement checks drawn on her trust account. Respondent did not recognize the names of the payees on the checks as her clients, and her secretary confirmed that they were not her clients. Respondent called the bank manager and told him not to cash the checks. While respondent was on the phone with the bank and her secretary, Ali paged respondent repeatedly. When respondent called Ali back, he told her

that they had several clients at the bank trying to cash settlement checks and the bank refused to do so. Ali asked respondent to call the bank and instruct them to cash the checks. Respondent told him she was in court and would have to handle the matter later.

The next day respondent called the Glendale Police Department. Respondent was told that she needed to talk to a detective in Orange County during business hours on Monday. On Sunday, respondent's secretary called respondent and told her that Ali had called and had instructed her (the secretary) not to go into the office on Monday because the office would be closed. Respondent went to her Orange County office early that Monday morning and found that the office was empty, and almost all of her client files were gone. She left the office and called the police. When the police arrived they went back to the office and found Ali and Veronica gathering up the last of the files. Over the next several hours respondent was able to retrieve, with police help, some, but not all, of her files back from Ken, Ali and Veronica.

In Ali's briefcase respondent found about \$4,000 in cash, a number of settlement checks, checks payable to doctors, and her rubber signature stamp. The brief case also contained some documents to make wire transfers to Swiss bank accounts. Respondent also asked Ali for her laptop computer, which contained a back-up list of all of her clients. When Ali returned the laptop to her, the hard drive was smashed. Respondent fired Ali, Veronica, and Ken that Monday.

Respondent first saw the monthly statements for her client trust account after she fired the three. By then a number of checks and bank statements were missing so she obtained them from her bank. Respondent believes that Ali, Ken and Veronica took money from her client trust account and general account and transferred it to Swiss bank accounts. She believes that the three accomplished this by issuing checks to bogus clients, who would cash the checks and return the money to Ali, Ken and Veronica. Respondent attempted to freeze the Swiss accounts but was unable to do so for more than three months. Respondent thinks that Ali's father-in-law was

involved because Ali transferred money from a Swiss bank account to the father-in-law's account in England.

According to respondent, there were more than 200 bogus checks generated and the total amount of the money taken by respondent's employees was about \$1.7 million. Respondent arrived at this figure by totaling all of the checks written to bogus clients. Respondent does not know when her employees started to embezzle the money. She does not know how much was actually deposited into her trust account during this period of time. She does not know what percentage of the deposits were stolen from her. She does not know how much of the stolen \$1.7 million belonged to her for fees, how much belonged to her clients, or how much belonged to medical care providers.

Respondent filed for bankruptcy in July 1999. In January 2000, respondent's bankruptcy case was converted from a Chapter 7 to a Chapter 11 bankruptcy. The bankruptcy case was still pending at the time of her State Bar Court trial. Respondent filed lawsuits against Ali, Veronica, and Ken in the United States as well as in Switzerland and England attempting to recover the embezzled money. It is not clear how much money respondent was eventually able to recover.

Respondent went through all of the client files she was able to recover to make sure the clients, medical providers and others were paid. If they had not been, she paid them. Most of respondent's clients were Spanish speaking and she placed advertisements regarding her bankruptcy in Spanish language magazines and newspapers, but she had very few clients file claims. Respondent was named as a defendant in approximately 185 small claims actions filed by medical providers. Those actions were all resolved through respondent's bankruptcy, either by payments or dismissals.

The hearing judge found respondent culpable of failing to perform legal services competently in violation of rule 3-110(A) of the Rules of Professional Conduct<sup>2</sup> in that

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<sup>2</sup>All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

respondent abrogated her responsibility to manage her office and her trust account and thereby cheated her clients; and culpable of engaging in conduct involving moral turpitude in violation of section 6106 of the Business and Professions Code<sup>3</sup> in that respondent breached her fiduciary duty by abdicating her responsibility to manage her office and her client trust account which caused the loss of \$1.7 million in client funds.

**B. Counts 17 and 18.**

In September 1997, Porfirio Antonio, Ramon Antonio and Araceli Figueroa hired respondent to prosecute their claims for damages payable under the uninsured motorist provisions of an automobile insurance policy. The claims of these three clients were later settled. At that time respondent reviewed the files for the clients; determined the amounts that were to be distributed to the clients, the medical care providers and herself; and instructed her staff to issue checks in those amounts.

Some time after respondent found out that her employees had embezzled money from her she went through the files of these three clients (as well as the files of other clients) and determined that despite her instructions, the clients had been paid less than they should have been. In October 1998, respondent wrote a letter to each of the three clients in which she informed them that they had been paid less than they were owed, provided them an accounting of the settlement money she received for their claims, and enclosed checks for the difference between what she had previously paid them and the correct amount that they were owed (\$975 to Porfirio, \$911 for Ramon, and \$1,175 for Araceli). She also informed the clients in these letters that she would pay them additional sums if she was able to negotiate a reduction of the medical provider claims. The record does not indicate whether respondent negotiated a reduction in the medical liens or paid the clients any additional sums as a result.

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<sup>3</sup>All further statutory references are to the Business and Professions Code unless otherwise indicated.

The three clients were apparently advised by their new attorney not to cash the October 1998 checks. The clients eventually filed claims in respondent's bankruptcy. The claims were settled with the approval of the bankruptcy court and respondent sent the clients' new attorney a check for \$5,248 in July 2001, which sum included the amounts of the three earlier uncashed checks plus an additional amount.

The hearing judge found respondent culpable of failing to render an accounting of client funds to the three clients in violation of rule 4-100(B)(3) in that the accounting was not furnished until October 1998 and should have been provided in March 1998; and culpable of failing to pay client funds promptly in violation of rule 4-100(B)(4) in that respondent failed to pay the three clients their share of the settlement proceeds until October 1998 and failed to pay them their full share of the settlement money until July 2001, and failed to pay the medical liens.

**C. Count 24.**

John Leland was employed by several medical lienholders to collect money from respondent. In response to Leland's collection efforts, respondent wrote him a letter in February 1999 stating that Leland's clients were under criminal investigation and that if Leland attempted to damage her credit or garnish her wages, she would make Leland's conduct "part of the investigation by the District Attorney and the F.B.I." She also stated that if Leland did not cease further action, she would turn over Leland's name and company information to the "F.B.I." The letter indicated that a copy of the letter was sent to the Federal Bureau of Investigation, the District Attorney's Fraud Investigation Unit, the U.S. Attorney's Office, the Department of Insurance, the Board of Chiropractic Examiners, the California Chiropractic Association, and the Chiropractic Board of California.

The hearing judge found that by sending the letter respondent threatened to present criminal charges to obtain an advantage in a civil dispute in violation of rule 5-100(A).



#### **D. Aggravating and mitigating circumstances.**

The hearing judge found in aggravation that respondent committed multiple acts of wrongdoing and that her violations demonstrated a pattern of misconduct (std. 1.2(b)(ii), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (stds.)); respondent was unable to account to the clients for their stolen trust funds (std. 1.2(b)(iii)); respondent's misconduct harmed significantly a large and undeterminable number of clients, the public and the administration of justice (std. 1.2(b)(iv)); respondent demonstrated indifference toward rectification of or atonement for the consequences of her misconduct in that she failed to identify all the clients she harmed, failed to account for the funds stolen and failed to repay the clients' losses (std. 1.2(b)(v)); and respondent displayed a lack of cooperation to the State Bar during its investigation by not identifying the clients and their losses (std. 1.2(b)(vi)).

The hearing judge found in mitigation that respondent did not have a record of discipline in her 10 years of practice before the present misconduct. (Std. 1.2(e)(i).) Six character witnesses testified on respondent's behalf. (Std. 1.2(e)(vi).) They were an environmental consultant and his wife, a minister, a dental assistant/lab technician, a car dealer, and respondent's sister. All of the witnesses had known respondent for many years and believed that she was honest. In addition, the witnesses testified that respondent performed significant pro bono services for them and for the Assyrian community. The hearing judge concluded that the character witnesses "did not provide an extraordinary demonstration of good character, other than [for respondent's] pro bono work."

#### **II. DISCUSSION**

As indicated above, respondent requested review. She argues that the State Bar did not prove any of the charges by clear and convincing evidence and that, even if the review department concludes that she is culpable, the hearing judge's disbarment recommendation is

excessive. The State Bar asserts that the hearing judge's culpability conclusions and disbarment recommendation are supported by the record.<sup>4</sup>

**A. Counts 1 and 2.**

Respondent advances several arguments in support of her claim that the charges in counts 1 and 2 were not proven. Central to many of these assertions is respondent's claim that rule 3-110(A) "is intended to address the incompetent performance of legal services" and not the failure to prevent employee misuse of the attorney's client trust account. Respondent cites no authority for this proposition.

We first note that this argument misapprehends the nature of the charges in this case. Respondent was not charged with, nor found culpable of, failing to prevent her employees' theft of trust account money. Rather, the gravamen of this case is respondent's complete failure to have adequate office procedures in place to protect client funds and to adequately supervise her subordinate staff to ensure that those procedures were followed. The misconduct here involves respondent's actions and inactions, not those of her staff.

The comments in the Discussion of rule 3-110(A) make clear that the rule is intended to include the duty to supervise the work of attorney and non-attorney staff. The Supreme Court has recognized this duty in numerous cases. (See e.g., *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795-796.) Respondent's own testimony establishes that she operated a high volume personal injury practice with multiple financial transactions occurring on a regular basis and that the office procedures she had in place were so lax that she could not possibly ensure the integrity of her clients' funds. Respondent did not sign checks drawn on her business or trust accounts. Instead, she authorized her staff to do so using a rubber stamp of her signature. Having delegated this significant authority to her staff, respondent had no procedures in place to ensure that client funds were protected. She did not regularly

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<sup>4</sup>The State Bar argued before the hearing judge that respondent should be suspended for three years, stayed, with three years' probation and two years' actual suspension.

review these accounts, she did not review any trust account bank statement herself, she never compared the settlement checks she received with the deposits in the trust account, she never reconciled the trust account, nor did she review any of the cancelled checks for any of her accounts. She does not know to this day how much was actually deposited into her trust account. We conclude that clear and convincing evidence was presented showing that respondent failed to supervise her non-attorney staff and thereby wilfully violated rule 3-110(A).

The only argument offered by respondent in support of her claim that she is not also culpable of violating section 6106 is that the cases cited by the hearing judge are distinguishable from hers.<sup>5</sup> We need not address this contention. An attorney has a “personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.” (*Palomo v. State Bar*, *supra*, 36 Cal.3d at p. 795.) This duty is nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) As we noted in *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410, “the law is clear that where an attorney’s fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support” a charge of violating section 6106. (See also *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 475.)

In the present case, respondent gave control of her trust account to her bookkeeper and then failed to supervise the management of the account or to examine the bank statements or other records. The result was the theft of \$1.7 million. “Any procedure so lax as to produce that result was grossly negligent.” (*Palomo v. State Bar*, *supra*, 36 Cal.3d at p. 796, fn. 8.) We conclude based on the above that respondent is culpable of engaging in acts of moral turpitude in violation of section 6106 by breaching her fiduciary duty to safeguard client funds.

Although we find that respondent is culpable of the above violations, we agree with her argument that there is no clear and convincing evidence establishing how much of the stolen

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<sup>5</sup>The hearing judge cited *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, and *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411.

money belonged to clients. As we noted, respondent was the only live witness. Her testimony was equivocal and contradictory. She testified that she does not know how much of the \$1.7 million belonged to her for fees, how much belonged to her clients, or how much belonged to medical care providers. She also testified that she believed that the money was taken from attorney fees that she was owed or from amounts that resulted from negotiated reductions in medical liens. Respondent told the three clients involved in counts 17 and 18 that her ex-employees had stolen money “belonging to me and to my clients.” Respondent also testified that the trustee in her bankruptcy was unable to determine the owners of the stolen money after an extensive and expensive investigation.

We find no merit to the State Bar’s argument that money in a client trust account is presumed to belong to the clients and that it was respondent’s burden to prove otherwise. The State Bar cites no authority for this proposition and we are aware of none. The State Bar alleged in the notice of disciplinary charges that client money was stolen and it had the burden to present clear and convincing evidence proving that allegation. (Rule 213, Rules Proc. of State Bar; *Himmel v. State Bar* (1971) 4 Cal.3d 786, 794.) The State Bar failed to do so.

Underlying much of the State Bar’s position in this case is its possible confusion between the duty of an attorney to keep proper books and records of client funds in the attorney’s possession (e.g., *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 332), and its own duty to prove its case by clear and convincing evidence. (Rules Proc. of State Bar, rule 213.) Regardless of what inferences we may draw from an attorney’s failure to keep proper books of account or records in an appropriate case, we must ultimately recognize that the State Bar’s burden requires it to present proof in the form of stipulated facts or admissible evidence to support each of the elements of its disciplinary case. (Cf. *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.) In this case, there is no stipulation of facts obviating proof. Moreover, considering that the State Bar has alleged respondent’s \$1.7 million loss of trust funds, the State

Bar has failed to present expected probative testimonial or documentary evidence,<sup>6</sup> choosing to rest solely on respondent's testimony and then criticizing respondent for not having presented records listing her clients and detailing payments to them.

On the other hand, we also do not find clear and convincing evidence supporting respondent's claim that the stolen money belonged to her for her attorney's fees. The record before us simply does not clearly and convincingly permit us to allocate the stolen money between respondent, her clients or their medical providers.

Finally, respondent claims, again without citation to any legal authority, that she should not be found culpable because the notice of disciplinary charges alleged that specific consequences resulted from her failure to supervise her client trust account and none of those specific consequences were proven. We find no merit to this argument. The notice charged that respondent failed to supervise her non-attorney staff and the State Bar proved that charge.

#### **B. Counts 17 and 18.**

The hearing judge found that the three clients (Porfirio Antonio, Ramon Antonio and Araceli Figueroa) signed releases in settlement of their cases in March 1998 and that respondent did not provide the clients with an accounting until October 1998, did not pay them their initial share of the settlement money until October 1998, did not pay them their full share of the settlement money until July 2001, and did not pay the outstanding medical liens. The hearing judge concluded that in failing to provide an accounting to her clients until October 1998, respondent failed to render appropriate accounts in violation of rule 4-100(B)(3); and that in failing to pay her clients promptly their share of settlement money and failing to pay the medical liens, respondent violated rule 4-100(B)(4).

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<sup>6</sup>The State Bar's failure to offer important evidence is most glaring when, in this case alleging such significant trust account losses, the record contains not a single trust account bank statement or records of any items deposited into or paid out of respondent's trust account. Although the State Bar has discretion to prove its case by its choice of relevant evidence, it cannot prevail by advocating a view of the record unsupported by evidence fundamental to a case such as this.

The evidence introduced in connection with these counts consisted of respondent's October 1998 letters to the three clients, copies of the checks sent to the clients, and respondent's brief testimony. Contrary to the hearing judge's finding, there was no evidence introduced indicating that the clients signed releases in March 1998 or any other time, nor was there any other evidence introduced showing when the cases settled.

The State Bar argues that respondent did not provide the clients with an accounting when she first sent them money. The State Bar's brief does not include record references to support this factual claim. Respondent testified that her practice was to prepare an accounting and have the client approve it prior to settlement of a case; but there is no evidence indicating whether or not that practice was followed with regard to the three clients involved in these counts. Respondent's October 1998 letters to the three clients informed them that they had been paid less than they were owed, provided them an accounting of the settlement money she received for their claims, and enclosed checks for the difference between what she had previously paid them and the correct amount that they were owed. The letters thus indicated that settlement money had been previously paid to the clients, but did not indicate whether or not an accounting had been previously provided. We find no direct factual support for the State Bar's claim.

Rule 4-100(B)(4) requires that an attorney promptly pay or deliver client money "in possession of the member." By its terms, the important date for purposes of this rule is when respondent received the settlement money, not the date the clients signed releases or the date the cases settled. No evidence was presented showing when respondent received the settlement money. At most, the record shows that respondent received the settlement money at some point in time, paid the clients, and then in October 1998 paid the clients an additional sum because she had determined after reviewing their files that they had been paid less than they should have.

Although not entirely clear, the State Bar seems to argue that the October 1998 accounting and payment of additional sums inferentially shows that any original accounting provided was inaccurate and that the original payment was insufficient. However, in view of

respondent's testimony that there may have been ongoing negotiations to reduce the medical liens, it is entirely plausible that more money was owed to the clients because medical liens were reduced after the initial payment. Thus, any initial accounting may have been accurate at the time it was provided, and the initial sum paid to the clients may have been payment of all the client funds in respondent's possession at the time of the disbursement. Because of the lack of evidence presented on this issue, we are left to speculate as to when respondent received the settlement money and why additional amounts were paid to the clients.

We also do not know whether the additional amounts paid in July 2001 represented client funds in possession of respondent that should have been paid previously. This payment was made as the result of a negotiated settlement of claims filed in respondent's bankruptcy. Respondent testified that the clients' bankruptcy claims were made for the full amount of the settlement, which would have included the amounts respondent was owed for her fees, and that the extra amount paid in July 2001 "would have come from [her] attorney's fees." The State Bar did not present any contrary evidence. (Cf. *In the Matter of Heiser*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 54.)

The evidence presented regarding whether the medical liens had been paid was equally unclear. First, we do not know when respondent received the settlement money. In addition, respondent stated in her October 1998 letters to the clients that she would "return any sums to you that I am able to negotiate with the doctor." Respondent testified at trial that she did not know if the medical providers had been paid and that she would "imagine" that this statement in the letters indicated that she was "still negotiating with the doctors." No evidence was presented showing whether respondent paid the medical providers after October 1998. Thus, the record shows that respondent received settlement money at some point in time and was possibly still negotiating with the medical providers in October 1998. We do not find this evidence to clearly and convincingly establish that respondent did not pay the medical liens.

Resolving all reasonable doubts in respondent's favor, as we must, we conclude that the charges in counts 17 and 18 are not "sustained by convincing proof to a reasonable certainty." (*McCray v. State Bar* (1985) 38 Cal.3d 257, 263.)

**C. Count 24.**

Respondent asserts on review that she is not culpable of threatening to present a criminal charge to gain an advantage in a civil dispute in violation of rule 5-100(A) because she did not threaten to file a criminal complaint in her February 1999 letter; she merely stated her intention to bring the conduct of the collection agent to the attention of various prosecuting agencies. In *Crane v. State Bar* (1981) 30 Cal.3d 117, the attorney wrote a letter demanding that the recipients pay money that the attorney believed was owed in a civil dispute and the attorney stated in the letter that if the money was not received within five days, the attorney would commence an action to recover the money and would "request" a specified state regulatory agency and the state attorney general to "assist us in solution." The letter also indicated that copies were sent to the director of the regulatory agency and to a named deputy attorney general. The Supreme Court concluded that viewed from the perspective of the recipients and in context, the letter with the notations that it was being sent to official agencies, "could quite reasonably be construed as violative of [the rule.]" (*Id.* at p. 123.)

The letter respondent sent in the present case asserted that the collection agent's clients were engaging in criminal activity and threatened to make the collection agent's conduct "part of an ongoing investigation by the District Attorney and the F.B.I." Further, the letter indicated that copies were sent to the Federal Bureau of Investigation, the United States Attorney's Office and the District Attorney as well as several state regulatory agencies. There is little qualitative difference between the letter respondent sent and the letter sent in *Crane*. Neither letter specifically stated that the author was going to file criminal charges. If anything, respondent's threat to make the collection agent's conduct "part of" an ongoing criminal investigation is a more direct threat to present criminal charges. We conclude that viewed from the perspective of



the collection agent and in context, respondent's letter, with the notations that copies were being sent to the various agencies, is quite reasonably construed as a threat to present criminal, administrative, or disciplinary charges against the collection agent in order to gain an advantage in a civil dispute in violation of rule 5-100(A). We agree with and adopt the hearing judge's conclusion to this effect.

**D. Aggravating and mitigating circumstances.**

Although the parties do not contest the aggravating circumstances found by the hearing judge, we note that many of them are based on the hearing judge's conclusion that client funds were stolen. As indicated above, we find no clear and convincing evidence to support this conclusion and therefore do not find clear and convincing evidence supporting the aggravating circumstances based on it.

We agree with the hearing judge that respondent committed multiple acts of wrongdoing. However, we also view respondent's continuous disregard of her trust account duties over the approximately one and one-half years as demonstrating a pattern of misconduct. Yet, we note that "for the purposes of determining aggravation the result is the same whether [respondent's] conduct is characterized as multiple acts of wrongdoing or as a pattern of misconduct." (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149-1150, fn. 14.)

We agree with the mitigating circumstances found by the hearing judge. We also agree that the good character evidence does not meet the standard which requires an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities. (Std. 1.2(e)(vi).) Nevertheless, the witnesses had known respondent for many years and attested to her honesty, and we give some weight in mitigation to this evidence. We also consider mitigating the evidence of respondent's pro bono work for her church and community. Although not found by the hearing judge, we note that respondent testified regarding her pro bono activities, which included her volunteer work as a settlement judge for one week a year for several years. We consider this a mitigating circumstance as well.

Respondent argues that her prompt reporting of her employees to the police and the significant expense she incurred in pursuing them in order to recover the stolen money should be considered mitigating. We do accord some weight in mitigation to respondent's prompt action once she learned of evidence that her employees were engaged in wrongdoing. We also credit the steps she has taken to make amends to clients she was able to identify.

### **III. DISCIPLINE**

In summary, we have found respondent culpable of failing to perform legal services competently in violation of rule 3-110(A) in that respondent abrogated her responsibility for one and one-half years to manage her office and her trust account; of engaging in conduct involving moral turpitude in violation of section 6106 in that respondent breached her fiduciary duty to safeguard client funds; and of threatening to present criminal, administrative, or disciplinary charges in order to gain an advantage in a civil dispute in violation of rule 5-100(A). In mitigation, we find that respondent does not have a record of prior discipline. We also give some mitigating weight to respondent's good character evidence, her pro bono activities and remedial steps.

The appropriate discipline to be imposed in a given case is not derived from any fixed formula; rather it is determined from a balanced consideration of all relevant factors. (*McCray v. State Bar*, *supra*, 38 Cal.3d at p. 273.) The discipline imposed in past similar cases provides guidance but is not binding. (*Levin v. State Bar*, *supra*, 47 Cal.3d at p. 1150.) The hearing judge considered *In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. 119, *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. 411, and *In the Matter of Steele* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708. The parties also cite to these cases to support their respective positions regarding discipline.

*Sampson* involved an attorney who failed to supervise his personal injury practice and recklessly disregarded his trust account duties for almost a year. The resulting chaos led to shortfalls in his trust account which in turn led to misappropriation of client funds and to the

failure to pay medical providers. Sampson also failed to perform services competently in other matters and failed to notify a client of the receipt of settlement money. In aggravation, Sampson committed multiple acts of misconduct and significantly harmed a medical provider. In mitigation, Sampson had no record of discipline in 15 years of practice. Sampson was suspended for three years, stayed, with three years' probation and 18 months' actual suspension.

*Jones* involved an attorney who allowed a non-attorney to conduct a large scale personal injury practice involving capping, forgery and other fraudulent practices in the attorney's name. The non-attorney handled all aspects of the personal injury practice without any supervision from Jones. Nearly \$60,000 withheld from client settlements was misused. In mitigation, Jones turned the non-attorney in to the police and cooperated with the authorities, established his good character and community activities and paid nearly \$57,000 of his own money to medical providers to remedy the non-attorney's misconduct. In aggravation, Jones committed multiple acts of misconduct and caused considerable harm to medical providers. Jones was suspended for three years, stayed, with three years' probation and two years' actual suspension.

*Steele* involved an attorney who for more than two years allowed his office manager, a non-lawyer, to run his practice, sign client trust account checks and handle all financial transactions without supervision. Despite evidence that the non-attorney was telling clients that he was Steele's partner and evidence that the non-attorney was embezzling funds, Steele did nothing to prevent further theft of client funds. Steele also personally committed other acts of dishonesty. In aggravation, Steele lacked candor during the disciplinary proceeding and committed multiple acts of misconduct. Very little mitigation was found. Steele was disbarred.

In *Palomo v. State Bar, supra*, 36 Cal.3d 785, the attorney gave control of his client trust account to his office manager and then failed to examine the records or bank statements, which permitted a \$3,000 client check to be deposited into the attorney's payroll account. Palomo made restitution to the client with interest before any State Bar involvement. He was suspended for one year, stayed, with one year probation and no actual suspension.

In *In the Matter of Blum, supra*, 4 Cal. State Bar Ct. Rptr. 403, the attorney and her then attorney husband were partners and both were signatories on the client trust account. Because of her work load, Blum's husband managed the day to day operations of the law office, including the trust account. The husband grossly mismanaged the financial aspects of the practice, which resulted in the misappropriation of client funds in two matters. Blum also was found culpable of charging an illegal fee. In mitigation, Blum had no record of prior discipline in 14 years of practice, suffered from extreme emotional difficulties, was candid and cooperative in the disciplinary proceeding, changed her office procedures to take full charge of all aspects of her practice including the handling of the finances and her trust account, and established her good character. In aggravation, Blum engaged in multiple acts of misconduct and significantly harmed her clients. She was suspended for three years, stayed, with two years' probation and 30 days' actual suspension.

In *Coppock v. State Bar, supra*, 44 Cal.3d 665, the attorney opened a client trust account for the purpose of sheltering a client's assets from creditors and thereafter relinquished all control of the account to the client, which allowed the client to use the account to defraud a business partner out of \$10,000. In mitigation, the attorney cooperated with the State Bar and was remorseful. Coppock was suspended for two years, stayed, with two years' probation and 90 days' actual suspension.

In *Gassman v. State Bar* (1976) 18 Cal.3d 125, the attorney delegated responsibility to manage his trust account to his secretary and then failed to supervise the secretary. Client funds in a single matter were deposited into a commercial account and were used to pay Gassman's office expenses. Gassman also failed to perform services competently in two other matters and entered into an illegal fee splitting agreement with the secretary. The Supreme Court imposed one year actual suspension.

We see the present case as less serious than *Steele*, more serious than *Gassman*, and as reasonably comparable to *Jones*. Both respondent and Jones engaged in prolonged and gross

neglect of the most fundamental duties of an attorney and thereby created situations that permitted non-attorneys to have virtually unlimited control over the financial aspects of their law practices. As in *Jones*, the full extent of the harm that resulted from respondent's extreme neglect of her trust account duties may never be known. A key factor in this case, as in *Jones*, is the magnitude of the potential harm to clients. Even if a relatively small portion of the \$1.7 million stolen by respondent's employees was trust funds, the risk created by respondent's inattention was enormous. That all of the stolen money was not client money was simply fortuitous.

Most troubling in this case, as in *Jones*, is the lack of evidence showing respondent's belated understanding of her trust account duties and showing what changes, if any, respondent has made to her office procedures. Based on the record before us, we have little confidence that respondent knows and understands the importance of her strict adherence to her nondelagable trust account obligations, and knows and understands the many trust account related tasks, such as maintaining client ledgers and reconciling the trust account, that must be performed on a routine basis in order to safeguard client funds. Absent this understanding, there is a risk of future misconduct.

As we noted in *Jones*, the "protection of the public is the key reason for imposing attorney discipline." (*In the Matter of Jones, supra*, 2 Cal. State Bar Ct. Rptr. at p. 421.) We conclude based on a balanced consideration of the seriousness of the misconduct as well as the mitigating and aggravating circumstances, that eighteen months' actual suspension retroactive to the date of respondent's inactive enrollment is adequate to protect the public. We shall accordingly terminate, effective upon the filing of this opinion, the order of inactive enrollment filed in this case pursuant to section, subdivision 6007(c)(4).

#### **IV. FORMAL RECOMMENDATION**

For the foregoing reasons, we recommend that respondent Monica Malek-Yonan be suspended from the practice of law for a period of five years, that execution of suspension be

stayed and that respondent be placed on probation for a period of five years on the following conditions:

1. That Respondent be actually suspended from the practice of law for eighteen months retroactive to May 26, 2002, the date of respondent's inactive enrollment.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.
3. Subject to the proper assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.
4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent shall file with each required report a certificate from respondent and a certified public accountant or other financial professional approved by the State Bar's Office of Probation in Los Angeles, certifying that: respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Client's Funds Account"; and respondent has kept and maintained the following:
  - i. a written ledger for each client on whose behalf funds are held that sets forth:
    1. the name of such client,
    2. the date, amount, and source of all funds received on behalf of such client,

3. the date, amount, payee and purpose of each disbursement made on behalf of such client, and
4. the current balance for such client;
- ii. a written journal for each client trust fund account that sets forth:
  1. the name of such account,
  2. the date, amount, and client affected by each debit and credit, and
  3. the current balance in such account.
- iii. all bank statements and canceled checks for each client trust account; and
- iv. each monthly reconciliation (balancing) of (i), (ii), and (iii) above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii) above, the reason for the differences, and that respondent has maintained a written journal of securities or other properties held for a client that specifies:
  1. each item of security and property held;
  2. the person on whose behalf the security or property is held;
  3. the date of receipt of the security or property;
  4. the date of distribution of the security or property; and
  5. the person to whom the security or property was distributed.

If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the State Bar's Office of Probation for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

The requirements of this condition are in addition to those set forth in rule 4-100, Rules of Professional Conduct.

6. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, her current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Office of Probation in Los Angeles, her current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
7. Within one (1) year after the effective date of the Supreme Court order in this matter, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)
8. Within one (1) year after the effective date of the Supreme Court order in this matter, respondent shall supply to the State Bar's Office of Probation in Los Angeles satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, within the same period of time, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2212, and passage of the test given at the end of that session. Arrangements to attend Ethics School Client Trust Accounting School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is

separate from any Minimum Continuing Legal Education Requirement (MCLE), and Respondent shall not receive MCLE credit for attending Trust Accounting School. (Rule 3201, Rules Proc. of State Bar.)

9. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if she has complied with the terms and conditions of probation, the Supreme Court order suspending her from the practice of law for five years shall be satisfied, and the suspension shall terminate.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one (1) year of the after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of her passage of that examination to the State Bar's Office of Probation in Los Angeles within that same time period.

As our recommendation provides for no prospective actual suspension, we decline to recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

We also recommend that costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

Finally, upon the filing of this opinion, we terminate the order of inactive enrollment entered by the hearing judge, pursuant to Business and Professions Code section 6007, subdivision (c)(4).

STOVITZ, P. J.

We concur:

WATAI, J.  
EPSTEIN, J.



Case No. 97-O-14777

**In the Matter of Monica Malek-Yonan**

**Hearing Judge**

Stanford E. Reichert

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